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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL GONZALES, Defendant and Appellant.	B202370 (Los Angeles County Super. Ct. No. KA039561)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wade D. Olson, Judge. Affirmed in part; reversed in part.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Manual Gonzales appeals from the judgment entered following his conviction by jury of attempted murder, two counts of being an active gang member in possession of a concealed firearm, and two counts of being a juvenile ward in possession of a firearm. (Pen. Code, §§ 664, 187, 12025, subd. (a)(2), 12021, subd. (e).)[1] The jury also found with respect to the attempted murder that it was willful, deliberate, and premeditated, defendant used and discharged a firearm which proximately caused great bodily injury to the victim, and defendant inflicted great bodily injury on the victim. (§§ 664, subd. (a), 12022.53, subd. (d), 12022.5, subd. (a), 12022.53, subd. (b), 12022.7, subd. (a).) It also determined that all of the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang. (§ 186.22, subd. (b)(1).) Defendant appeals, contending that the evidence is insufficient to sustain the conviction of being an active gang member in possession of a concealed firearm (count two) and his section 1118.1 motion as to count four, which alleged the identical charge, should have been granted. We agree the conviction on count two must be reversed, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

As defendant challenges the sufficiency of the evidence as to counts two and four only, we set forth an abbreviated version of the facts. Count two alleged that on the date defendant committed the attempted murder, February 27, 1998, he possessed a concealed firearm. Count four alleged that on the date of his arrest, May 14, 1998, he again possessed a concealed firearm. Defendant does not dispute the prosecution proved that he was an active gang member, the element that made the offense a felony. (§ 12025, subd. (b)(3).)

On February 27, 1998, two individuals, Tavares Daniels and William White, saw defendant emerge from an automobile and fire numerous rounds from a handgun. The

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[1] All further statutory references are to the Penal Code.

specific testimony they offered with respect to the firearm defendant possessed is as follows.

Daniels said defendant was a passenger in an automobile that approached a group of people with whom Daniels was standing. The car stopped, and defendant got out holding a firearm. He was approximately 10 feet from Daniels. Daniels saw defendant extend his right arm and shoot. He offered no further testimony regarding defendant's possession of the gun.

White saw defendant get out of the passenger side of a car, produce a gun, aim, and fire a weapon. White was asked if he ever saw a gun inside the vehicle defendant exited, and he answered, "No, I can't say I saw that, no." He first saw the gun as defendant was "swinging it out." The prosecution elicited nothing more concerning defendant's possession of the firearm on that occasion.

On May 14, 1998, Pomona Police Department Officer Darryl Kendrick was present when the car containing defendant was stopped by police. Another officer driving a black and white patrol car activated the unit's overhead lights while following the vehicle, and the vehicle slowed. The driver's door opened, and defendant, the right front passenger, exited the vehicle before it came to a complete stop. As Officer Kendrick and Officer Gutierrez approached, they ordered defendant to freeze. He turned, looked in the officers' direction, and dropped a .38 caliber revolver from his right hand onto the street. Before the weapon fell to the ground, Kendrick saw that defendant had the weapon in the "[p]ocket area" on his "[r]ight side." Kendrick was approximately seven to eight feet away when he saw defendant drop the gun.

After the prosecution rested, defendant moved for an acquittal on all charges pursuant to section 1118.1. The motion was denied.

DISCUSSION

Defendant argues the evidence is insufficient to sustain his conviction on count two and the trial court should have granted his section 1118.1 motion on count four.[2] He contends that in order to be convicted of violating section 12025, subdivision (a)(2), an individual must carry a firearm concealed upon his or her person, and asserts there was no evidence he did so on either of the occasions in question.

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We use the same standard in cases where the People rely mainly on circumstantial evidence, as they did here. (*Ibid.*)

The prosecution's evidence on count two is problematic. Neither witness saw defendant with the gun until after he exited the passenger side of the vehicle. Neither was able to testify where defendant had the gun prior to exhibiting and firing it. The Attorney General asserts that "White could see that appellant reached somewhere 'pulling' or 'bringing' the 'gun out.' The jury could reasonably infer that [defendant] had to pull or bring the gun out from his waistband or pocket as the gun was hidden and unobservable from the witnesses' vantage point, even if for a split second as [defendant] got out of the car and began shooting." We disagree.

Contrary to the Attorney General's claim, White did not testify that he saw defendant reach anywhere prior to producing the gun. All he stated was that he saw defendant "swinging [the gun] out." The prosecution's other witness, Daniels, said only

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[2] In his opening brief, defendant argued the evidence is insufficient to sustain either conviction. After the Attorney General filed his brief and pointed out that defendant admitted on the witness stand that on the day he was arrested he had the gun in his pocket prior to exiting the car, defendant requested leave to file a supplemental brief, which we granted. In his supplemental brief, he argued his section 1118.1 motion, which was made prior to his admission, should have been granted.

that he saw defendant firing. He gave no information shedding any light on the question of where the gun came from. Based on the evidence presented, the jury could merely guess or suspect that defendant concealed the weapon on his person before emerging from the vehicle. A reasonable inference may not be based on suspicion or conjecture alone. A conviction must be supported by substantial evidence, not mere speculation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1133.) Since no witness saw where defendant obtained the weapon prior to firing it and there are no other circumstances from which one could infer where he had it before he got out of the car, there is no basis to conclude beyond a reasonable doubt that he retrieved it from a pocket or his waistband. Given that defendant participated in a drive-by shooting, arguably it is more likely he had his weapon at the ready as the vehicle approached the victims. We conclude the evidence is insufficient to sustain defendant's conviction on count two.

The conviction on count four is a different matter. When ruling on a motion for judgment of acquittal pursuant to section 1118.1, the trial court utilizes the same standard applied by an appellate court in reviewing the sufficiency of the evidence to sustain a conviction. The sufficiency of the evidence is tested at the point when the motion is made. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

Here, the jury verdict was not a product of speculation. The vehicle in which defendant was riding was stopped after a police unit activated its overhead lights. Officer Kendrick saw defendant alight from the vehicle before it came to a complete stop, turn in his direction, and immediately drop a revolver. The revolver was in defendant's right hand and he had it in his "pocket area" before dropping it. The jury could reasonably infer that defendant was startled by the police presence, removed the weapon from the pocket where Kendrick saw him holding the weapon, and attempted to discard it. Unlike the evidence in support of count two, the jury had a specific point of reference showing where defendant had the weapon prior to exiting the vehicle. Thus, the conclusion that the gun was concealed in his pocket within the meaning of section 12025, subdivision (a)(2) is based on evidence, not mere guesswork. As we "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence"

(*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we uphold the trial court's denial of defendant's section 1118.1 motion.

DISPOSITION

Defendant's conviction on count two is reversed. In all other respects, the judgment is affirmed. The trial court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.